

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>TIMOTHY DEKAT</b>	)	
Claimant	)	
VS.	)	
	)	
<b>DURHAM D &amp; M, LLC</b>	)	Docket No. 1,042,760
Respondent	)	
AND	)	
	)	
<b>OLD REPUBLIC INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent appeals the September 8, 2010, Preliminary Hearing Order of Administrative Law Judge Rebecca Sanders (ALJ). Claimant was awarded medical treatment with Lynn D. Ketchum, M.D., as the authorized treating physician for claimant's carpal tunnel syndrome (CTS) bilaterally. The ALJ determined that claimant's CTS more than likely existed prior to the July 31, 2008, date of accident, but was asymptomatic prior to this accident. Dr. Ketchum opined that claimant's CTS was aggravated by the July 31, 2008, accident.

Claimant appeared by his attorney, James B. Biggs of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Douglas C. Hobbs of Wichita, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held December 30, 2008, with attachments; the discovery deposition of Timothy J. Dekat taken February 19, 2009; the transcript of Motion Hearing held April 7, 2009, with attachments; the transcript of Preliminary Hearing held September 8, 2010, with attachments; and the documents filed of record in this matter.

**ISSUES**

1. Did the ALJ err in awarding claimant medical treatment for the bilateral CTS after determining that the accident of July 31, 2008, aggravated claimant's

previously asymptomatic CTS? Respondent argues that claimant's need for medical treatment for his CTS is not the product of the July 31, 2008, accident.

2. Did claimant provide timely notice of his alleged series of injuries?
3. Did claimant provide timely written claim of his alleged series of injuries?

#### **FINDINGS OF FACT**

After reviewing the record compiled to date, the undersigned Board Member concludes the Preliminary Hearing Order should be affirmed.

Claimant worked for respondent as the lead mechanic and had been employed with respondent for about 7 years. On July 31, 2008, claimant witnessed an individual attempting to steal fuel from respondent's facility. While attempting to stop that individual, claimant was struck by a large gate. This caused claimant to be knocked into a wall, rendering him unconscious for a short period of time. Claimant was taken to St. Francis Health Center and diagnosed with a major concussion. Claimant also had several lacerations, but x-rays showed no broken bones. A CT scan of his head showed edema but no intracranial bleeds. An MRI of claimant's neck and back showed multiple areas of spondylosis, greatest at L4-5 in the lumbar spine with multiple areas of spondylosis in the cervical spine with no significant spinal canal or neural foraminal stenosis. An EMG on September 18, 2008, indicated mild to moderate CTS.

Claimant has been diagnosed and/or treated by a multitude of physicians for headaches, dizziness, chronic fatigue, light and noise sensitivity which was a residual of post-concussive syndrome, arrhythmia, migraines and photophobia, hand numbness and arm tremors bilaterally, depression and anxiety disorder, hearing and vision problems, neck, shoulder and low back pain and chest pain. An EMG on September 18, 2008, displayed mild to moderate CTS bilaterally. Claimant also has a history of diabetes.

Claimant has been examined and/or treated by a multitude of health care providers as the result of the accident on July 31, 2008. While the record is considerable in this matter, two reports directly address the CTS and its relationship to the accident.

On May 4, 2009, claimant was referred by the ALJ to Kathryn A. Hedges, M.D., of the Kansas City Neurology Associates for an independent medical examination. Dr. Hedges reviewed extensive medical records and the multitude of tests performed on claimant. During the neurological examination, claimant was able to walk only with a cane as he would fall to the right side, could not heel or toe walk, had reflexes 2 out of 4 throughout the examination, and the toes on his right foot would go down while the toes on his left foot would go up. Claimant displayed decreased vibratory sensation in his right hand and foot and decreased field of vision to the right in his eyes bilaterally.

Claimant was diagnosed with posttraumatic headaches and dizziness, balance issues from the accident of July 31, 2008, anxiety, tremors, intermittent chest pain and possible panic attacks. He also displayed cognitive difficulty on neuropsychological testing. In Dr. Hedges' opinion, claimant had been provided adequate evaluation of his injury but not adequate treatment. Claimant was recommended to see, regularly, a neurologist for the headaches. Ongoing pain medication for the neck pain and trial treatments for the ongoing vertigo was also recommended. Claimant was diagnosed with hand numbness related to the bilateral CTS, which Dr. Hedges opined was not related to the accident. Claimant displayed significant loss of range of motion in his neck with some indication of a neck injury. This may be causing the up going left toe action and decreased vibratory sensation on his right side. Neuropsychological testing and psychological treatment were recommended.

Claimant was referred by his attorney to board certified plastic surgeon and hand specialist Lynn D. Ketchum, M.D., on March 2, 2010. Dr. Ketchum was also provided with a multitude of medical records and tests performed on claimant after the accident. His examination appeared to be primarily directed to the issue of the CTS and its cause. He reviewed the EMG tests from Wade B. Welch, M.D., from September 18, 2008, which displayed the mild to moderate CTS. Dr. Ketchum opined that claimant's CTS was related to claimant's repetitive gripping while at work over a lengthy period of time. Surgical releases bilaterally were recommended. He agreed with Dr. Welch that the numbness in claimant's arms related to the CTS and not to claimant's neck symptoms. Dr. Ketchum did not believe that claimant's CTS was related to the specific injury on July 31, 2008, but rather to the repetitive activities at work. He further opined that the CTS, while not caused by the accident, was aggravated by the accident.

It is noted that the Application For Hearing, K-WC E-1 (E-1), which was filed on October 27, 2008, lists an accident date of July 31, 2008, only. While the E-1 does discuss bilateral upper extremity injuries, there is no indication of a series of microtraumas while working for respondent. Additionally, at the preliminary hearing on September 8, 2010, claimant's attorney discussed the possibility of amending the E-1 to reflect a series of microtraumas to claimant's upper extremities. But no such amendment was ever filed of record. Claimant testified in this matter that, prior to the accident on July 31, 2008, he had never experienced the upper extremity symptoms.

#### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>1</sup>

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<sup>1</sup> K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>2</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>3</sup>

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."<sup>4</sup>

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.<sup>5</sup>

When a primary injury under the Workers Compensation Act arises out of and in the course of a worker's employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury.<sup>6</sup>

Claimant suffered, what appeared to be, a very serious injury while trying to protect his employer's property. His resulting injuries are many, varied and extensive. He has been examined and/or treated by numerous health care providers in many medical fields.

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<sup>2</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>3</sup> K.S.A. 2008 Supp. 44-501(a).

<sup>4</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

<sup>5</sup> *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

<sup>6</sup> *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

The diagnosis of CTS was made shortly after the accident with the EMG performed by Dr. Welch. Claimant testified that he had never experienced these upper extremity symptoms before. The record does contain medical opinions that claimant's CTS is not related to the accident. However, Dr. Ketchum opined that the CTS was, at least, aggravated by the accident. Whether claimant had preexisting CTS (which was aggravated) or asymptomatic CTS (which was made active from the accident), the law in Kansas is clear. Specific causation of a condition is not required in order to allow workers compensation benefits. An aggravation of a preexisting condition is sufficient to cause the award of medical benefits.

This Board Member finds the medical opinion of Dr. Ketchum, along with the testimony of claimant, sufficient to find that claimant's CTS was aggravated or made symptomatic by the accident of July 31, 2008. The award of benefits by the ALJ is affirmed. This finding renders moot the issues of notice and written claim for an alleged series of injuries.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>7</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

#### **CONCLUSIONS**

Claimant has satisfied his burden of proof that the accident on July 31, 2008, at the very least, aggravated his CTS. Therefore, the award of benefits is affirmed.

#### **DECISION**

**WHEREFORE**, it is the finding, decision, and order of this Appeals Board Member that the Preliminary Hearing Order of Administrative Law Judge Rebecca Sanders dated September 8, 2010, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

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<sup>7</sup> K.S.A. 44-534a.

Dated this \_\_\_\_ day of December, 2010.

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HONORABLE GARY M. KORTE

c: James B. Biggs, Attorney for Claimant  
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier  
Rebecca Sanders, Administrative Law Judge